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August 6, 2004

**DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS**

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: April 2, 2004

Case Number: TSO-0088

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as "the individual") to hold an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."^{1/} A Department of Energy (DOE) Operations Office suspended the individual's access authorization under the provisions of Part 710. This Decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be restored. As set forth in this Decision, I have determined that the individual's security clearance should be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the

^{1/} An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to variously in this Decision as an access authorization or security clearance.

common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

In this instance, the individual received a security clearance from DOE after gaining employment with a DOE contractor. However, the local DOE security office (DOE Security) initiated formal administrative review proceedings by informing the individual that his access authorization was being suspended pending the resolution of certain derogatory information that created substantial doubt regarding his continued eligibility. This derogatory information is described in a Notification Letter issued to the individual on February 18, 2004, alleging that the individual has (1) "an illness or mental condition of a nature which, in the opinion of a psychiatrist . . . causes, or may cause, a significant defect in [his] judgment and reliability," 10 C.F.R. § 710.8(h) (Criterion H), and (2) "engaged in unusual conduct . . . which tends to show that [he] is not honest, reliable, or trustworthy, or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation, or duress which may cause [him] to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l) (Criterion L). The bases for these findings are summarized below.

With regard to Criterion H, the Notification Letter states that on May 16, 2003, the individual was examined by a DOE consultant psychiatrist (DOE Psychiatrist) who subsequently reported his opinion that the individual has a mental condition which the DOE Psychiatrist describes as "a partner relational problem or a relational problem." According to the DOE Psychiatrist, this mental condition "can result in serious consequences" and "there is a risk of his having a lapse in judgment and/or reliability." With regard to Criterion L, the Notification Letter states that (1) the individual failed to report on his November 8, 2001 Questionnaire for National Security Positions (QNSP) his 1986 conviction on a charge of Aggravated Assault, (2) in 2000, the individual was involved in an altercation with his ex-girlfriend during which the individual kicked and broke the window of her automobile, and (3) in the opinion of the DOE Psychiatrist, the individual was evasive in responding to questions regarding his conduct posed during his psychiatric interview.

In a letter received by the DOE Office of Hearings and Appeals (OHA) on April 2, 2004, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). I was appointed the Hearing Officer. After conferring with the individual and the appointed DOE Counsel, 10 C.F.R. § 710.24, I established a hearing date. At the hearing, the DOE Counsel called the DOE Psychiatrist as his sole witness. Apart from testifying on his own behalf, the individual called as witnesses his wife, his former supervisor, and a co-worker who is also a close friend. The transcript taken at the hearing will be hereinafter cited as "Tr." Various documents that were submitted by the DOE Counsel and the individual during this proceeding constitute exhibits to the hearing transcript and will be cited as "Exh.".

Summary of Findings

The following factual summary is essentially uncontroverted. However, I will indicate instances in which there are disparate viewpoints regarding the information presented in the record.

The individual has held a DOE security clearance for more than twenty years as a condition of his employment with a DOE contractor. In November 1984, the individual's eligibility was called into question when the individual failed to report to DOE Security his arrest on a charge of Aggravated Assault. Upon discovering this information, DOE Security required the individual to complete a letter of interrogatory, dated September 22, 1985, describing the circumstances of the arrest. In the letter, the individual stated that he was arrested after hitting a woman in the head with a piece of iron pipe.

Further information received by DOE Security revealed that the November 1984 assault incident ensued after the individual came home and found out that his wife had been "slapped around" at work by the woman in a personal property dispute. This particularly angered the individual since his wife was seven months pregnant at the time. The individual drove to the woman's home to confront her and to tell her to stay away from his wife. The individual admittedly took the piece of pipe with him since, according to the individual, the woman is physically imposing and had a reputation for violence. The individual stated that upon arriving, the woman came at him with a can of beer and he hit the woman with the piece of pipe in response. The woman had superficial injuries requiring three stitches. Under a plea bargain, the individual was convicted of Aggravated Assault in March 1986, and received two years probation which the individual successfully completed.

The matter of the individual's 1986 Aggravated Assault conviction was favorably resolved by DOE Security and the individual maintained his security clearance. The individual reported the conviction on two subsequent QNSP's he submitted for scheduled reinvestigations. However, the individual failed to report the conviction on a QNSP he submitted in November 2001. The individual told the investigator assigned to his case that he did not report the 1986 conviction on his 2001 QNSP because he believed that the conviction had been expunged. In addition to this omission, it was discovered during the reinvestigation that in May 2000, the individual was involved in an altercation with an ex-girlfriend. A personnel security interview (PSI) was therefore conducted with the individual on February 25, 2003, to resolve these matters. The circumstances of the May 2000 incident are explained below.

During the early 1990's, when the individual was divorced, he fathered a daughter with his girlfriend. The individual's relationship with the girlfriend subsequently ended. However, the individual maintained a relationship with his daughter. The

individual provided child support payments to his ex-girlfriend and received weekend visitation of his daughter. The individual explained during the PSI that the May 2000 altercation occurred on a Saturday of a weekend when he had custody of his daughter. Early that morning, the individual received a phone call from his ex-girlfriend who asked the individual what activities he had planned for their daughter. Apparently unsatisfied with the individual's response, the ex-girlfriend arrived at the individual's home unannounced and proceeded to the individual's bedroom. According to the individual, the ex-girlfriend became verbally abusive without warning, calling him names and making insulting accusations, and then abruptly went back to her car. The individual followed her, reportedly to determine the reason for her abusive statements. However, the ex-girlfriend closed herself in her car and continued to make insulting gestures. The individual stated that he became angry and kicked the window of the car to show the ex-girlfriend that he was offended by her behavior. However, the individual kicked the window harder than he intended and broke the glass. At this point, the police were called to the scene. No one was injured and the police apparently did not consider the matter serious. The police did not arrest the individual or take a police report. Nonetheless, following the incident, the ex-girlfriend sought and obtained an Order of Protection against the individual.

Subsequent to the PSI, the individual was referred to the DOE Psychiatrist who evaluated the individual on May 16, 2003. In addition to the 1984 and 2000 incidents, the DOE Psychiatrist describes in his report an incident that occurred in 1974 involving the individual. At this time, the individual was dating a girl whose mother did not like the individual's association with her daughter. On the evening in question, the girl's mother confronted the individual when he was returning the girl home from a party they attended together. The individual had been drinking and the mother called the police. The individual was arrested on a charge of Drunk and Disorderly Conduct, but the charges were later dropped.

Based upon the three incidents, occurring in 1974, 1984 and 2000, the DOE Psychiatrist opines in his report that the individual has no diagnosable personality disorder, but that he has "a pattern of anger and outbursts toward women" and that "this pattern does qualify as a condition either as a partner relational problem (V61.1) or as a relational problem, not otherwise specified (V62.81) as described in our diagnostic manual." The DOE Psychiatrist states that several times during his interview the individual seemed to mask or gloss over details in an apparent attempt to minimize or perhaps conceal his conduct in these episodes. The DOE Psychiatrist thus concludes regarding the individual: "[I]n my opinion, he does have a mental condition which can result in serious consequences. He also has a style of evading direct discussion of them. Therefore, in my opinion, there is a risk of his having a lapse in judgment and/or reliability."

II. Analysis

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal matter, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. See *Personnel Security Hearing*, Case No. VSO-0078, 25 DOE ¶ 82,802 (1996). In this type of case, we are dealing with a different standard designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE Security has made a showing of derogatory information raising security concerns, the burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

I have thoroughly considered the record of this proceeding, including the submissions of the parties, the evidence presented and the testimony of the witnesses at the hearing convened in this matter. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the voluntariness of the participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant and material factors. After due deliberation, it is my opinion that the individual's access authorization should be restored since I conclude that such restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(d). The specific findings that I make in support of this determination are discussed below.

A. Criterion H; Mental Condition

With regard to Criterion H, the Notification Letter states that on May 16, 2003, the individual was examined by the DOE Psychiatrist who subsequently reported his opinion that the individual has a mental condition which the DOE Psychiatrist describes as "a partner relational problem or a relational problem." According to the DOE Psychiatrist, this mental condition "can result in serious consequences" and

“there is a risk of his having a lapse in judgment and/or reliability.” Exh. 8 at 4. The DOE Psychiatrist clarified during his testimony that “this is not a diagnosis in our manual, but it’s listed under other conditions,” and that manual he was referring to is the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR)*. Tr. at 16-17; see also Tr. at 26 (“a mental condition but not one that reaches the level of a diagnosis”). Despite the lack of an actual diagnosis, I find that DOE Security properly invoked Criterion H in suspending the individual’s security clearance based upon the DOE Psychiatrist’s finding of a mental condition. However, for the reasons below, I find that security concerns associated with this finding have been sufficiently mitigated.

Initially, I find that the opinion of the DOE Psychiatrist that the individual has a Partner Relational Problem (V61.1) or as a Relational Problem, Not Otherwise Specified (NOS) (V62.81) is not supported by the record of this case and is plainly inconsistent with the criteria specified in the *DSM-IV-TR*. According to the DOE Psychiatrist, his finding is based upon the three incidents involving the individual that occurred in 1974, 1984 and 2000. Exh. 8 at 2-4; Tr. at 40-42. The *DSM-IV-TR* states in pertinent part:

Relational Problems

Relational problems include patterns of interaction between or among members of a relational unit that are associated with clinically significant impairment in functioning, or symptoms among one or more members of the relational unit, or impairment in the functioning of the relational unit itself. . . .

V61.10 Partner Relational Problem

This category should be used when the focus of clinical attention is a pattern of interaction between spouses or partners characterized by negative communication . . . that is associated with clinically significant impairment in individual or family functioning or the development of symptoms in one or both partners.

V62.81 Relational Problem Not Otherwise Specified

This category should be used when the focus of clinical attention is on relational problems that are not classifiable by any of the specific problems listed above (e.g., difficulties with co-workers).

DSM-IV-TR at 736-37 (emphasis supplied). Of the three incidents cited by the DOE Psychiatrist, only the final incident in May 2000 involving the altercation with the individual’s ex-girlfriend was arguably a “relational problem” under the *DSM-IV-TR* criteria since, as parents sharing custody of their daughter, they had “interaction” and

might be deemed to comprise “a relational unit.”^{2/} However, this one incident in 2000 would hardly constitute a “pattern of interaction” sufficient to justify the DOE Psychiatrist’s finding that the individual has a mental condition, either a Partner Relational Problem (V61.10) or a Relational Problem NOS (V62.81).^{3/}

More critically, I find that the DOE Psychiatrist has established no causal nexus between the mental conditions he ascribes and the individual’s judgment and reliability.^{4/} In his report, the DOE Psychiatrist concludes: “[I]n my opinion, [the individual] does have a mental condition which can result in serious consequences. He also has a style of evading direct discussion of them. Therefore, in my opinion, there is a risk of his having a lapse in judgment and/or reliability.” Exh. 8 at 4 (emphasis supplied). During the hearing, the DOE Psychiatrist clarified that the “risk” to which he was referring is not attributable to the individual’s purported Partner Relational Problem or Relational Problem NOS, but to the individual’s alleged evasive style of communicating. The DOE Psychiatrist stated: “[T]he thing that really concerns me is the evasiveness when he gets into trouble Again, the risk is not specifically the relationships. The risk is when he’s in a bind and push comes to shove he’s not going to be terribly honest. He’s going to try to evade; he’s going to feel the

^{2/} At the hearing, the DOE Psychiatrist provided no plausible explanation for his apparent misapplication of the *DSM-IV-TR* criteria but instead adopted an expansive definition of “relationship” to include the 1984 incident within the purported “pattern.” According to the DOE Psychiatrist, the individual had a “relationship” with the woman he assaulted in 1984, stating that: “[T]hey were in a relationship. It was not a good relationship; it was a bad relationship, but they were in a relationship.” Tr. at 42. However, the DOE Psychiatrist’s report states only that prior to incident in November 1984, the individual had warned the woman to stay away from his wife. Exh. 8 at 2. Other than this one encounter, there is no evidence in the record that the individual had any involvement with the woman. The DOE Psychiatrist’s strained interpretation of “relationship” is clearly inconsistent with the definition of “relational problems” contained in the *DSM-IV-TR* (i.e., “patterns of interaction between or among members of a relational unit”).

^{3/} With respect to the 1974 confrontation with his girlfriend’s mother, the record indicates that the individual married the girl a few years later, and the girl’s mother thus became his mother-in-law. Exh. 8 at 2; Tr. at 81. However, at the time of the incident, it is obvious that the individual was not in a “relational unit” with the girl’s mother. In any event, even assuming *arguendo* that the 1974 incident was a “relational problem” in addition to the 2000 incident, I refuse to find that two incidents separated by 26 years constitute a “pattern” of conduct on the part of the individual.

^{4/} A mental condition within the purview of Criterion H is one which, in the opinion of psychiatrist or licensed clinical psychologist, “causes or may cause, a significant defect in judgment and reliability.” 10 C.F.R. § 710.8(h).

need not to come straight forward and so on, and that could put him in a compromising position.” Tr. at 45-46. The DOE Psychiatrist went on to clarify that the evasiveness he perceived is not related to the individual’s purported mental condition. The DOE Psychiatrist confirmed that evasiveness is “not symptomatic” of either a Partner Relational Problem or Relational Problem NOS, Tr. at 46-47, and stated definitively that evasiveness is “not a part of that condition.” Tr. at 48.

Consequently, I can attach little weight to the report of the DOE Psychiatrist in this case.^{5/} At the same time, I received persuasive testimony at the hearing that the individual is mentally stable. The individual’s current wife^{6/} testified that she and the individual have a solid, loving relationship and that her marriage to the individual has been “an enjoyable experience.” Tr. at 8. The individual’s co-worker and former supervisor gave the individual high praise for his stability, self-control, reliability and trustworthiness. See Tr. at 55-57, 60-62, 65-66, 68. Based upon this testimony and the infirmities of the DOE Psychiatrist’s opinion, I find that the concerns of DOE Security under Criterion H have been adequately mitigated. In reaching this conclusion, I do not ignore that there have been isolated incidents of improper behavior by the individual, most recently in 2000 when he obviously lost control of his temper. I will address the 2000 incident and other matters under Criterion L, below. In the context of Criterion H, however, the record simply does not establish that the individual has a mental condition of a nature which causes, or may cause, a significant defect in his judgment or reliability.

B. Criterion L; Unusual Conduct

DOE Security further asserts in the Notification Letter that the individual has “engaged in unusual conduct . . . which tends to show that [he] is not honest, reliable, or trustworthy, or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation, or duress which may cause [him] to act contrary to the best interest of the national security.” In this regard, the Notification Letter raises three matters: (1) the individual failed to report on his November 8, 2001 Questionnaire for National Security Positions (QNSP) his 1986 conviction on a charge

^{5/} As an expert witness, substantial deference is generally accorded to the opinion of a DOE consultant-psychiatrist. However, the opinion of the DOE psychiatrist need not be blindly followed when clearly based upon a misapplication of the facts and circumstances presented in the case. See, e.g., *Personnel Security Hearing*, Case No. VSO-0279, 27 DOE ¶ 82,825 (1999), *aff’d*, (OSA, 2000).

^{6/} The individual remarried in June 2003. Tr. at 8. The individual’s wife testified that she has known the individual for three years and dated him for one year prior to their marriage. *Id.*

of Aggravated Assault;^{7/} (2) in May 2000, the individual was involved in an altercation with his ex-girlfriend during which the individual kicked and broke the window of her automobile; and (3) in the opinion of the DOE Psychiatrist, the individual was evasive in responding to questions regarding his conduct posed during his psychiatric interview in May 2003. I consider these matters successively below and conclude that the individual has also adequately mitigated the concerns of DOE Security.

Regarding his failure to list the 1986 conviction on his 2001 QNSP, the individual stated during the PSI that “it was supposed to have been expunged”^{8/} and that there “wasn’t any intention to mislead anybody.” Exh. 7 (PSI) at 5-6; see Exh. 9 (2001 QNSP). At the hearing, the individual could not explain why he listed the conviction on his QNSP’s since 1988, but not on his 2001 QNSP. See Tr. at 91. Nonetheless, I found the individual to be honest and forthright in his testimony that he made an honest mistake in failing to list the conviction and that “I didn’t do it to try to cover up anything, because it’s already knowledge.” *Id.* I further agree that the individual would have no reason to conceal a matter that had already been thoroughly considered and resolved by DOE Security.

Turning to the May 2000 incident, the individual testified convincingly that there was no intention to harm his ex-girlfriend and he broke the car window accidentally when he kicked it out of frustration with her actions and verbal abuse. Tr. at 94. The individual admits that he was angry and expressed appropriate regret for his conduct, stating: “I intended to kick it but I didn’t have an idea it was going to break. I didn’t know that I had kicked it that hard, but, you know, it was just to convey a message to her . . . I guess that wasn’t the smart thing to do but that was my way of letting her know you just don’t come to my house and do that sort of thing. Of course, I know now it probably should have been handled different.” Tr. at 94-95. Based upon the testimony of the individual’s current wife, close friend and former supervisor, the individual’s loss of temper is atypical of his behavior. Tr. at 9, 59-61, 68. The DOE Psychiatrist himself noted in his report that “[i]t is significant that as far as neighbors, co-workers, or supervisors, he gets glowing reports with no evidence of angry outbursts.” Exh. 8 at 2. Thus, I am satisfied that the altercation with his ex-girlfriend, which occurred four years ago, was an isolated incident. In addition, I find that there is no cognizable likelihood of recurrence. The individual no longer has any

^{7/} I note that DOE Security also states that the individual failed to report his arrest on the Aggravated Assault charge in November 1984. However, this matter was apparently resolved by DOE Security in 1985 when it continued the individual’s security clearance after he completed a Letter of Interrogatory concerning the incident.

^{8/} The individual’s counsel corroborated in the context of her questioning that the individual has been in contact her regarding the expungement of his 1986 conviction. Tr. at 92.

involvement with the ex-girlfriend and he is now involved in a stable, loving marriage.^{9/} Tr. at 73-74, 82, 88-89.

Finally, I find that the individual has overcome DOE Security's concern that he was "less than forthcoming" during his interview with the DOE Psychiatrist. According to the DOE Psychiatrist, the individual's "style of evading" direct discussion of certain matters bears negatively upon his judgment and reliability. Exh. 8 at 4. The DOE Psychiatrist elaborated at the hearing that when he questioned the individual about the 1974, 1984 and 2000 incidents, the individual "tended to gloss over things when I asked him about them and I really had to push to get the information about the situation." Tr. at 17. The DOE Psychiatrist believes that "[i]t's kind of dishonesty in a way." Tr. at 23. The DOE Psychiatrist stated that "a very good example" of the individual's evasiveness occurred during the PSI when the individual was asked about the altercation in 2000 with his ex-girlfriend.^{10/} Tr. at 21-22. The individual initially responded: "I was at home and, uh, the other party came to my house and started an altercation and, uh, as the result that's what ended up, the window ended up getting accidentally knocked out of the car." Exh. 7 (PSI) at 6.

I agree that the individual was somewhat vague in his initial response to the interviewer. However, I found no "unusual conduct" within the meaning of Criterion L. In reviewing the PSI transcript further, I find that the individual provided detailed information concerning the 2000 incident in response to more specific questions posed by the interviewer. See Exh. 7 (PSI) at 6-10. Interestingly, the DOE Psychiatrist makes a similar observation in his report: "It is apparent that he was not particularly comfortable with talking about things that might reflect poorly on him. However, he responded reasonably to my more probing questions." Exh. 8 at 1. During his hearing testimony, I also observed that the individual has a terse manner of communicating but that he responded fully and directly when specific questions were posed. I did not perceive any dishonest effort on the part of the individual to be evasive or to withhold the information being requested.

The individual appeared truthful in testifying that he tried to be honest and forthcoming during his interview with the DOE Psychiatrist, explaining: "I may be guilty of being a little nervous when it comes to answering questions about certain

^{9/} Under the Order of Protection obtained by the ex-girlfriend in August 2000, the individual is required to have no contact with her. See Exh. 14. By agreement, the individual's visitations with his daughter are arranged through his daughter's maternal grandmother. *Id.*

^{10/} The PSI transcript indicates that DOE Security was already aware of the 2000 incident. In beginning the line of questions, the interviewer informed the individual: "[I]nformation was obtained by the investigator that indicated that somewhere in 2000 that you got into an altercation where you kicked out somebody's car window." Exh. 7 (PSI) at 6.

things, but I have no reason to try to evade anything. There is no reason.” Tr. at 93. Moreover, I note that the individual has a solid reputation for honesty, reliability and trustworthiness among his co-workers. See Tr. at 55, 66. Under the circumstances of this case, I am not persuaded that the individual’s good reputation gained over many years is meaningfully diminished by the communicative shortcomings observed by the DOE Psychiatrist, or that he is not reliable, honest and trustworthy.

III. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. §§ 710.8(h) and (l) in suspending the individual's access authorization. However, for the reasons I have described above, I find that the individual has adequately mitigated the associated security concerns. I therefore find that restoring the individual’s access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored. The Manager of the Operations Office or the Director, Office of Security Affairs, may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Fred L. Brown
Hearing Officer
Office of Hearings and Appeals

Date: August 6, 2004